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July 8, 2004

Mr. J. Antonio Barbosa
Executive Secretary
Agricultural Labor Relations Board
915 Capitol Mall, Third Floor
Sacramento, CA 95814

RE: Gallo Vineyards, Inc.
Case Nos. 03 CE 9 SAL; 03 CE 9 1 SAL

Dear Mr. Barbosa:

This firm is counsel to the California Labor Federation, AFL-CIO. At the request of Executive Secretary-Treasurer Art Pulaski and President Tom Rankin, we are submitting the following comments in response to the Notice of Opportunity to Provide Written and Oral Argument dated June 18, 2004.

QUESTION NO. 1:

> What are the existing standards under the Agricultural Labor Relations Act and the National Labor Relations Act regarding the level of unlawful employer assistance, short of instigation, that warrants dismissing a decertification petition and setting aside any subsequent election, i.e., is any level of assistance sufficient, or must the assistance be of a particular nature or scope in order to warrant the remedy of dismissing the petition?

COMMENT:

Because the Question does not distinguish between situations where unfair labor practices have been charged and where they have not and because NLRB law makes that distinction, this Comment will assume that both sides of the distinction may be responsive.

The law administered by the NLRB under the National Labor Relations Act makes a distinction between the outright (and generally final) dismissal of a decertification petition because of employer assistance and the placing in abeyance of that petition pending investigation of unfair labor practice charges involving such assistance.

A) Absence of Unfair Labor Practice Charges.

Absent unfair labor practice charges, the NLRB will administratively dismiss a decertification petition but only if there is direct involvement of an employer in tainting the showing of interest offered to the agency to support the petition. Examples of direct involvement given in the NLRB Case Handling Manual include circulation by supervisors of the showing of interest for signatures of workers or threats of job action made to workers if they do not support the showing of interest. See generally American Int. Manufacturing Corporation d/b/a Nu-Aimco, Inc. 306 NLRB 978 (1992); Canter's Fairfax Restaurant, Inc., 309 NLRB 883 (1993); NLRB Case Handling Manual, § 11028.2.

B) The Presence of Unfair Labor Practice Charges.

When an unfair labor practice charge is present, whether a petition is dismissed outright or held in abeyance depends upon a more nuanced investigation of the charge and the evidence to sustain it. Of course the nature and number of wrongful acts may vary widely from case to case and need not involve assistance at all. If the charge is found to implicate the employer's duty to recognize and bargain, then if the charge is proven a petition should be dismissed outright because a real question of representation cannot exist. An example would be an employer who refuses to any longer recognize or bargain pending resolution of a decertification petition it instigated or assisted. See generally Overnite Transportation Co., 333 NLRB 1392 n. 6 (2001); NLRB Case Handling Manual, § 11730.

On the other hand, where a charge alleges employer conduct that does not directly implicate the recognition/bargaining duty, the decertification petition will be held in abeyance if the charges if proven would interfere with employee free choice. Ibid.

Charges alleging a violation of § 8(a)(1) for unlawful assistance to a decertification effort are always of a character which implicate the employer's duty of recognition or bargaining. They never constitute conduct which merely interferes with employee free choice although they also do that as well. NLRB Case Handling Manual, § 11730.3(a) and 3(b).

Thus, any level of assistance when it is with respect to a decertification showing of interest is inconsistent with an employer's pre-existing duty to recognize and bargain.

Put another way, there are recognized ways for an employer possessed of a good faith doubt about a union's continuing majority status legally to invoke the NLRB's or ALRB's jurisdiction. When an employer assists (whether it initiates the idea or not), the employer interferes with the agency's settled processes for resolving representation issues just as much as it unmistakably indicates to the workers its active approval of the decertification effort. The ALRA like the NLRA is about worker rights and only secondarily about union or employer rights. Whether to decertify or not is uniquely a matter for the exercise of employee rights. For the ALRB to even begin to invite a parsing of the levels or extent of assistance is to countenance interference with employee rights and also, as noted, to invite assaults on the integrity of the agency's own legal processes for identifying legitimate questions of representation and resolving representation issues. It is this latter reason which justifies the Board in dismissing a petition outright whether a charge has been filed or not, or whether the General Counsel in a complaint has requested that remedy or not. The very integrity of the agency's processes are implicated by unlawful assistance.

The NLRB has refused to find that supervisory assistance is too isolated and insignificant simply because the agency cannot precisely measure the impetus the unlawful assistance gave to an overall decertification drive. Walker Mfg. Co., A Div. of Tenneco, 288 NLRB 888 (1988). That is, doubts are resolved against the employer whose supervisor(s) first stepped over the legal line. That result best comports with the command of the Act to respect the rights of workers under the ALRA while maintaining the integrity of the agency's processes.

QUESTION NO. 2:

Do the factors listed in *Overnite Transportation Company* (2001) 333 NLRB 1392 apply in cases involving unlawful employer assistance in procuring the showing of interest for a decertification petition?

COMMENT:

No. Overnite did not involve concurrent assistance with the two decertification petitions which gave rise to the decision. Rather, the issue was whether a causal connection could be shown to exist between earlier numerous, national, "serious"

unfair labor practices, partially unremediated at the time of the administrative decision to dismiss the petitions, and subsequent employee disaffection so that the lingering effect of those unfair labor practices tainted the petitions. It was in this context (only) that the Board used the Master Slack Corp. 271 NLRB 78 (1984) factors. (The earlier unfair labor practices included threats of job loss; threats of plant closures; suggestions of the futility of collective bargaining; threats of loss of pension benefits; threats of more onerous working conditions; employer promises to remedy grievances and to grant benefits; the unilateral granting of wage increases to employees in non-represented units; the withholding of wage and other benefits for represented units; direct negotiating with represented employees, etc.) We are not aware of a case where the NLRB has applied the Master Slack factors where there is a claim of assistance directly with regard to the showing of interest for a decertification petition itself.

The instant case before the ALRB implicates direct assistance with the gathering of a showing of interest. Anti-union petitions can arise in a number of other contexts but their handling there is different. See e.g. Williams Enterprises, 312 NLRB 937 (1993) enf. 50 F.3d 1280 (4th Cir. 1995) [successorship].

QUESTION NO. 3:

> Are NLRB cases involving unlawful employer assistance, in the context of withdrawals of recognition or RM petitions, apposite or inapposite to cases involving only employee initiated decertification petitions?

COMMENT:

Inapposite.

Gallo cites the ALRB to a case like Clark Equipment Company, 278 NLRB 498 (1986). In Clark, there was an organizing drive, and after a representation petition was filed, the Board found a question of representation to exist and set an election. The employer engaged in unlawful interrogation, coercive comments and threats and unlawful surveillance. The Board concluded that the misconduct could not possibly have affected the results of the election because it involved 8 employees out of a unit of over 800. The objections to the election were overruled and the results of the election were certified.

Clearly, as we argue more fully above, employer assistance in decertifying a lawful bargaining representative is of a different character. An issue of whether employer conduct has affected an election does not implicate whether a question of representation existed in the first place. Issues of initiation or assistance in the very procuring of a showing of interest do. That is why the law provides for administrative dismissal even in the absence of the filing of an unfair labor practice charge where an employer has been directly involved in the procuring of the showing of interest. Employer conduct interfering with the election itself only occurs after the agency has found a question of representation to exist warranting an election. In such a context it is proper to weigh the effect of the conduct on the exercise of the right to vote under the (sometimes shifting) standards of the NLRB.

Proper respect for the rights of employees under the respective Acts requires that employer instigation and/or assistance in a decertification petition should always draw dismissal because there cannot be a valid question of representation. If the ALRB is of a mind to change the law, it is inviting an administrative and evidentiary morass: if an employer has been ham-handed, a petition will be dismissed, but if an employer has been more subtle, then the agency will be willing to assess just how subtle it has been in order to see if the subtlety eluded the workers or not. This only invites evasion of the Act, of its purposes and of the ALRB's processes.

Thank you.

Very truly yours,

LAW OFFICES OF
CARROLL & SCULLY, INC.

Donald C. Carroll

DCC:lml
cc: Mr. Art Pulaski
Mr. Tom Rankin
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